

No. 89-1323

Supreme Court, U.S.
FILED

MAR 19 1990

JOSEPH E. SARNIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

BERNIE E. ZETTL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner seeks review of a decision upholding the government's claim that classified information is inadmissible at his trial.

1. On September 10, 1985, a grand jury in the Eastern District of Virginia returned an indictment charging petitioner with conspiracy to convert government documents to his own use and to defraud the United States, in violation of 18 U.S.C. 371; conversion and unauthorized transfer of government documents, in violation of 18 U.S.C. 641; and transmission of a document relating to national defense that he possessed without authorization, in violation of 18 U.S.C. 793(e). The indictment charged that petitioner, a paid consultant to GTE Government Systems Corp., improperly conveyed military procurement documents to his co-defendants, who were GTE employees. Pet. App. 8a. In particular, the indictment charged that petitioner sup-

plied his co-defendants with Navy Program Element Descriptions (PEDs) that he possessed without authority. A PED is a document the Navy prepares to support its budget request to Congress. The indictment alleged that obtaining those documents gave GTE a competitive edge in bidding on Defense Department contracts. Pet. App. 9a.

Prior to trial, pursuant to Section 5 of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 5, petitioner and his co-defendants notified the government that they intended to introduce at trial several hundred documents containing classified information. Pet. App. 11a. The district court held that approximately 192 documents or parts of documents were relevant to the defense and admissible at trial. Pet. App. 13a. Pursuant to Section 7 of CIPA, the government took an appeal from that ruling.

2. The court of appeals (Pet. App. 7a-23a) affirmed the district court's relevancy determinations. The court remanded the case to the district court, however, to allow the government to assert its claim that the documents were protected by the state secret or informant privileges. On remand and on the government's motion, the district court dismissed all but one count of the indictment — the count charging that petitioner violated 18 U.S.C 641 by the unauthorized conveyance of the PEDs. The government informed the district court that it would proceed against petitioner only under that portion of Section 641 that prohibits conveying government property without authority. Pet. App. 2a-3a.

Petitioner then claimed that 28 classified documents were relevant to his defense to the charges as narrowed by the government. After holding additional hearings under CIPA, the district court held that to prove a violation of Section 641, the government must show that petitioner converted government property. Thus, the court held, Section 641 required the government to prove that petitioner substantially interfered with the government's ownership rights. Pet.

App. 2a-3a. The court then found that the documents that the defense sought to introduce were relevant to the issue whether a conversion had occurred. Alternatively, the court held that the documents were relevant to several other issues.

3. The government again appealed pursuant to CIPA. This time, the court of appeals reversed. Pet. App. 1a-6a.¹ The court first held (Pet. App. 3a-4a) that Section 641 did not require the government to prove that petitioner had converted government property. The court found that the government could prove a violation of Section 641 either by showing that petitioner converted government property or by showing that he conveyed the property without authority. Because the government sought to proceed under that portion of Section 641 that prohibits the unauthorized conveyance of government property, the court held (Pet. App. 4a-5a) that the documents petitioner sought to admit at trial were no longer relevant to the case.

4. Petitioner contends (Pet. 5-14) that the court of appeals' decision that Section 641 does not require the government to prove the elements of conversion conflicts with the statute's legislative history, with this Court's decision in *Morissette v. United States*, 342 U.S. 246 (1952), and with the decisions of other courts of appeals. In addition, petitioner claims that Section 641 does not prohibit the theft or conversion of intangible property.

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had ruled in the government's favor on the relevancy of the documents that petitioner sought to introduce at trial. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted

¹ The court of appeals' second decision is reported at 889 F.2d 51 (1989).

and his conviction is affirmed on appeal, he will be able to raise his current contentions, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him.

The Classified Information Procedures Act does not require a different result. Section 7 of CIPA gives the government the right to take an interlocutory appeal from a district court's decision to authorize the disclosure of classified information. That Section, however, makes no special provision for an appeal by a defendant or for review by this Court of a decision adverse to a defendant in the court of appeals. Indeed, petitioner asserts that this Court's jurisdiction rests on 28 U.S.C. 1254(1) and not on CIPA. See Pet. 1. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.²

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

MARCH 1990

² Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

